

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

8 CLIFFORD MACIAS,)
9 Plaintiff,) No. CV-05-3108-CI
10 v.) ORDER DENYING PLAINTIFF'S
11 JO ANNE B. BARNHART,) MOTION FOR SUMMARY JUDGMENT
12 Commissioner of Social) AND GRANTING DEFENDANT'S
13 Security,) MOTION FOR SUMMARY JUDGMENT
14 Defendant.)
15)

16 BEFORE THE COURT are cross-motions for Summary Judgment (Ct.
17 Rec. 17, 21.) Attorney D. James Tree represents Plaintiff;
18 Assistant United States Attorney Pamela J. DeRusha and Special
19 Assistant United States Attorney Thomas Elsberry represent
20 Defendant. The parties have consented to proceed before a
21 magistrate judge. (Ct. Rec. 6.) After reviewing the administrative
22 record and briefs filed by the parties, the court **DENIES** Plaintiff's
23 Motion for Summary Judgment.

JURISDICTION

25 On April 3, 2002, Clifford Macias (Plaintiff) filed for
26 Disability Insurance Benefits (DIB) and Social Security Income
27 (SSI). (Tr. 54, 261.) Plaintiff alleged an onset date of June 1,
28 2001, due to depression. (Tr. 80.) Benefits were denied initially

1 and on reconsideration. (Tr. 37.) Plaintiff requested a hearing
2 before an administrative law judge (ALJ), at which he requested
3 benefits for a closed period from June 1, 2001, through September 1,
4 2004. (Tr. 40, 278.) The hearing was held before ALJ Mary Reed on
5 January 19, 2005. (Tr. 269-319.) Plaintiff, who was represented by
6 counsel, testified. The ALJ denied benefits and the Appeals Council
7 denied review. (Tr. 8, 15-27.) The instant matter is before this
8 court pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF THE CASE**

10 The facts of the case are set forth in detail in the transcript
11 of proceedings, and are briefly summarized here. At the time of the
12 hearing, Plaintiff was 45 years old and had a high-school education.
13 (Tr. 280.) He attended cosmetology school full time from October
14 2001 through February 2003, and completed the program. (Tr. 106,
15 125-38, 291.) He was separated from his wife at the time of the
16 hearing, and had two children who did not live with him. (Tr. 253,
17 281, 301.) He lived with his father, who provided financial
18 support. (Tr. 302.) He had past relevant work as a mental
19 retardation aide for 10 years, industrial cleaner, cashier, and
20 cosmetologist. (Tr. 59-63, 315-16.) He stated in his work report
21 that he had had over 150 jobs, but did not provide titles or
22 descriptions. (Tr. 89.) At the time of the hearing, Plaintiff was
23 working as a home attendant for the developmentally disabled. (Tr.
24 315.)

25 **ADMINISTRATIVE DECISION**

26 The ALJ found Plaintiff was working as a home attendant at
27 substantial gainful activity levels beginning September 1, 2004.
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1 (Tr. 19.) She found Plaintiff had worked during the closed period
 2 at issue, but these jobs were of short duration and were considered
 3 an unsuccessful work attempt. Therefore, at step one, the ALJ
 4 found Plaintiff had not engaged in substantial gainful activity
 5 during the closed period. (Tr. 20.) She found Plaintiff had been
 6 treated with chiropractic therapy throughout 2003, but the evidence
 7 did not indicate that any anatomical or physiological abnormality
 8 lasted the 12 month duration period required for a finding of
 9 disability. (Tr. 23.) She also found Plaintiff suffered from
 10 depressive disorder, NOS, but his allegations of disability were not
 11 supported by medical evidence, and were not "severe" as defined by
 12 the Social Security Act. The ALJ denied benefits at step two. (Tr.
 13 26-27.)

14 **STANDARD OF REVIEW**

15 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 16 court set out the standard of review:

17 A district court's order upholding the Commissioner's
 18 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 19 Commissioner may be reversed only if it is not supported
 by substantial evidence or if it is based on legal error.
 20 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
 Substantial evidence is defined as being more than a mere
 21 scintilla, but less than a preponderance. *Id.* at 1098.
 Put another way, substantial evidence is such relevant
 22 evidence as a reasonable mind might accept as adequate to
 support a conclusion. *Richardson v. Perales*, 402 U.S.
 389, 401 (1971). If the evidence is susceptible to more
 23 than one rational interpretation, the court may not
 substitute its judgment for that of the Commissioner.
 24 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169
 F.3d 595, 599 (9th Cir. 1999).

25 The ALJ is responsible for determining credibility,
 26 resolving conflicts in medical testimony, and resolving
 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 27 Cir. 1995). The ALJ's determinations of law are reviewed
 28 *de novo*, although deference is owed to a reasonable

1 construction of the applicable statutes. *McNatt v. Apfel*,
 2 201 F.3d 1084, 1087 (9th Cir. 2000).

3 **SEQUENTIAL PROCESS**

4 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 5 requirements necessary to establish disability:

6 Under the Social Security Act, individuals who are
 7 "under a disability" are eligible to receive benefits. 42
 8 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 9 medically determinable physical or mental impairment"
 10 which prevents one from engaging "in any substantial
 11 gainful activity" and is expected to result in death or
 12 last "for a continuous period of not less than 12 months."
 13 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 14 from "anatomical, physiological, or psychological
 15 abnormalities which are demonstrable by medically
 16 acceptable clinical and laboratory diagnostic techniques."
 17 42 U.S.C. § 423(d)(3). The Act also provides that a
 18 claimant will be eligible for benefits only if his
 19 impairments "are of such severity that he is not only
 20 unable to do his previous work but cannot, considering his
 21 age, education and work experience, engage in any other
 22 kind of substantial gainful work which exists in the
 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

23 In evaluating whether a claimant suffers from a
 24 disability, an ALJ must apply a five-step sequential
 25 inquiry addressing both components of the definition,
 26 until a question is answered affirmatively or negatively
 27 in such a way that an ultimate determination can be made.
 28 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 claimant bears the burden of proving that [s]he is
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 1999). This requires the presentation of "complete and
 detailed objective medical reports of h[is] condition from
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 404.1512(a)-(b), 404.1513(d)).

23 **ISSUES**

24 The question is whether the ALJ's decision is supported by
 25 substantial evidence and free of legal error. Plaintiff argues the
 26 ALJ erred in finding Plaintiff's claim was groundless at step two.
 27 (Ct. Rec. 19 at 16.)

1 **DISCUSSION**2 **A. Step Two**

3 Plaintiff argues the record supports a step two finding that
4 his mental impairments cause "more than a 'slight abnormality' in
5 his ability to work." (Ct. Rec. 19 at 19.) To satisfy step two's
6 requirement of a severe impairment, the claimant must prove the
7 existence of a physical or mental impairment by providing medical
8 evidence consisting of signs, symptoms, and laboratory findings; the
9 claimant's own statement of symptoms alone will not suffice. 20
10 C.F.R. §§ 404.1508, 416.908; Social Security Ruling (SSR) 96-3p.
11 Plaintiff's testimony that his failure to keep a job is caused by
12 symptoms of a mental impairment is not sufficient to satisfy the
13 severity requirement.

14 Because an overly stringent application of the severity
15 requirement may violate the statute by denying benefits to claimants
16 who do meet the statutory definition of disabled, the Commissioner
17 has passed regulations which guide dismissal of claims at step two.
18 *Corrao v. Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). Those
19 regulations state an impairment may be found to be "not severe" only
20 when evidence establishes a "slight abnormality" on an individual's
21 ability to work. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir.
22 1988) (citing SSR 85-28). The ALJ must consider the combined
23 effect of all of the claimant's medically established impairments on
24 the ability to function, without regard to whether each alone was
25 sufficiently severe. See 42 U.S.C. § 423(d)(2)(B)(Supp. III 1991).
Once determined "severe," an impairment must meet the durational
requirement; i.e., it must last or be expected to last for a
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1 continuous period of 12 months to be considered a disability. 20
2 C.F.R. §§ 404.1505(a), 416.905(a).

3 A mental impairment generally is considered non-severe for
4 purposes of step two if the degree of limitation in the three
5 functional areas of activities of daily living, social functioning,
6 and concentration, persistence or pace is rated as "none" or "mild,"
7 and there have been no episodes of decompensation, unless the
8 evidence otherwise indicates minimal limitations in a claimant's
9 ability to work. 20 C.F.R. §§ 404.1520a(d)(1), 416.920a(d)(1).
10 Further, "impairments that can be controlled effectively with
11 medication are not disabling for the purpose of determining
12 eligibility for SSI benefits." *Warre v. Commissioner of Social Sec.*
13 *Admin*, 439 F.3d 1001, 1006 (9th Cir. 2006); *c.f. Gamble v. Chater*,
14 68 F.3d 319, 321 (9th Cir. 1995)(benefits cannot be denied because
15 claimant cannot afford treatment).

16 Although the step two inquiry is a *de minimis* screening device
17 to dispose of groundless or frivolous claims, *Bowen v. Yuckert*, 482
18 U.S. 137, 153-154 (1987), the medical evidence nonetheless must be
19 evaluated carefully in the sequential evaluation to determine
20 whether the claimed impairment and related symptoms alleged
21 significantly restrict an individual's physical and mental ability
22 to do basic work. *SSR* 96-3p.

23 **B. Medical Evidence**

24 ALJ Reed carefully summarized and evaluated the medical
25 evidence provided. She found Plaintiff had a significant depressive
26 episode in July 2001, for which he was hospitalized, but one month
27 after treatment with medication, he improved significantly. (Tr.
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1 23-24.) She found Plaintiff's alleged disabling symptoms caused by
2 depression were not supported by the objective medical evidence.
3 (Tr. 25.) The ALJ then considered other relevant information in the
4 record, including Plaintiff's self-report and observations from
5 other sources. (Tr. 25-26) She determined Plaintiff's depressive
6 disorder, NOS, caused minimal limitations in his ability to work,
7 and was not severe. (Tr. 26.) These findings are supported by
8 substantial medical evidence.

9 Plaintiff was examined in August 2001, shortly after his
10 hospitalization for depression, by Arch Bradley, M.Ed. (Tr. 158-
11 162.) Dr. Bradley administered a number of objective tests,
12 including the Wechsler Adult Intelligence Scale-III, to determine
13 Plaintiff's IQ and learning capabilities. He concluded Plaintiff
14 was of average intelligence (measuring a full scale IQ of 89), and
15 his critical learning aptitudes, attention and mental alertness were
16 within average limits. (Tr. 159-60.) He also noted Plaintiff's
17 concentration was good throughout testing and he was not confused
18 "at any time." (Tr. 160-61.) Based on test results, Dr. Bradley
19 concluded Plaintiff's employment problems were not caused by a
20 specific learning disorder, and opined Plaintiff should be able to
21 complete cosmetology or technical training. (Tr. 162.)

22 Regarding his depression, Dr. Bradley observed "no overt signs
23 of depression from [Plaintiff's] social presentation." (Tr. 161.)
24 During the interview, Plaintiff reported great improvement in his
25 mental health within one month after hospitalization and beginning
26 treatment with Effexor. (Tr. 158, 160.) Dr. Bradley reported
27 Plaintiff "has not had employment problems because of below-average
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1 intelligence, memory, reading or math. That leaves whatever his
2 physician is treating him for as the probable cause [for employment
3 problems] since treatment is successful according to Mr. Macias."
4 (Tr. 162.)

5 Plaintiff submitted mental health records for the relevant
6 period from Central Washington Comprehensive Mental Health (CWCMH),
7 dated August 2001 to November 5, 2003. (Tr. 171-78, 234-42.)¹
8 Treating physician Jan Kiele, M.D., diagnosed Plaintiff with
9 depression disorder, NOS, in August 2001, and continued treatment
10 with Effexor. (Tr. 171-74.) As found by the ALJ, the mental health
11 records consistently report excellent results from medication used
12 to treat Plaintiff's depression, and no significant limitations in
13 Plaintiff's ability to function. For example, Plaintiff was able to
14 start cosmetology school in November 2001, and records indicate he
15 received A's and B's in his work, and completed the course. (Tr.
16 253.) This ability to attend and satisfactorily complete
17 cosmetology school is inconsistent with Plaintiff's claim that his
18 depression caused more than a "slight abnormality" in his ability to
19 work. See *Matthews v. Shalala*, 10 F.3d 678, 680 (1993). Dr. Kiele
20 noted Plaintiff reported "mild depression" in November 2001, and
21 some increased depression in March 2002, due to worries about losing
22 health benefits and his medications. (Tr. 175.) Apparently, this
23 was resolved, and in August 2002, Dr. Kiele noted Plaintiff reported
24 doing "pretty good," and doing well in school. (Tr. 177.) There

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¹ Additional CWCMH records for the period December 2004 to
27 February 2005, reference treatment outside the closed period at
28 issue. (Tr. 252-60.)

1 were no records of more than mild symptoms reported at this time.
2 Rafat Zakary, M.D., who completed CWCMH progress notes for October
3 2002 through May 2003, consistently assessed Plaintiff's
4 presentation "WNL" (within normal limits); Plaintiff reported
5 sleeping and eating well, with no side effects to his medication.
6 He was doing well and conforming to medication requirements. (Tr.
7 234-38.) After three "no shows" at the CWCMH, Plaintiff was
8 discharged in November 2003. (Tr. 242.)

In his visits to Central Washington Family Medicine during the time at issue, Plaintiff reported the Effexor worked "great." In November 2003, his medical provider noted Plaintiff looked and felt "completely healthy." (Tr. 208). He did not complain of depression symptoms, concentration or memory problems. (Tr. 210.) In addition to the medical reports and records from treating and examining doctors, the ALJ considered the report of non-examining agency psychologist, Edward Beaty, Ph.D. (Tr. 26, 179-90.) Dr. Beaty completed a psychiatric review technique form covering the period from June 2001 to October 2002. He found Plaintiff had no severe impairment at the time of the assessment (October 2002), and had not had a severe impairment in the past that met the durational requirement. (Tr. 179.) Specifically, he found no limitations in Plaintiff's activities of daily living, mild limitations in his social functioning and concentration, pace and persistence, and one to two episodes of decompensation of extended duration.² (Tr. 189.)

² In social security proceedings, "severity" of an impairment is measured according to limitations imposed on these four areas by the medically determined mental impairment. As explained in the

1 **C. Medical and Non-Medical Opinions**

2 In the sequential evaluation, an ALJ must give "specific and
3 legitimate" reasons for rejecting contradicted medical opinions from
4 treating or examining physicians. If medical opinions are
5 uncontradicted, the reasons must be "clear and convincing." *Lester*
6 *v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). As discussed above,
7 Plaintiff's treating and examining doctors found Plaintiff responded

8 _____

9 Regulations: "Episodes of decompensation are exacerbations or
10 temporary increases in symptoms or signs accompanied by a loss of
11 adaptive functioning, as manifested by difficulties [in the other
12 three areas]." 20 C.F.R. Pt. 404. Subpt. P, App.1, 12.00 C4. The
13 term "repeated episodes of decompensation, each of extended
14 duration" means at least three episodes within one year or an
15 average of once every four months. Documentation of significant
16 medication changes, hospitalization or placement in a structured
17 living environment is evidence of an "episode of decompensation."
18 *Id.* Here, the record indicates two depressive episodes were
19 reported, one in July 2001 (which required hospitalization) and one
20 in March 2002 (worry, decreased sleep and depressed affect reported
21 by Plaintiff's mental health provider, but no change in medication
22 or living environment and no suicidal ideation). (Tr. 175.) These
23 were resolved with medication within two months. Therefore, it
24 appears Plaintiff's episodes did not rise to the level of
25 "decompensation" as defined by the Regulations. Further, the two
26 episodes of record occurred about eight months apart; therefore, Dr.
27 Beaty's finding of one or two episodes of decompensation is not
28 supported by substantial evidence.

1 well to medication; none reported significant limitations caused by
2 his diagnosed depression. The ALJ's findings are consistent with
3 these medical source opinions.

4 Plaintiff argues Global Assessment of Functioning (GAF) scores
5 assessed by medical personnel indicate his impairments caused more
6 than "slight abnormality," relying on GAF scores assessed by Dr.
7 Kiele and Dr. Bradley in July and August 2001, and by CWCMH
8 therapists in November 2003 and December 2004. (Ct. Rec. 19 at 19.)

9 Plaintiff also cites the fact that he was unable to keep his
10 cosmetology jobs as evidence of a severe impairment. (Id.)

11 Plaintiff provides no legal support for the contention that a
12 GAF score is a basis for a finding of severe impairment as defined
13 by the Regulations. The GAF scale is a common diagnostic tool for
14 tracking and evaluating the overall psychological functioning of a
15 patient. The information is used in planning treatment, measuring
16 its impact, and predicting outcome. Unless identified as the
17 highest in a given period of time (e.g., for the past year), ratings
18 on the GAF scale reflect an individual's level of functioning at the
19 time of evaluation. A score of 41-50 indicates a patient is
20 currently experiencing serious symptoms (e.g., suicidal ideation,
21 severe obsessional rituals, frequently shoplifting OR any serious
22 impairment in social, occupational, or school functioning (e.g., no
23 friends, unable to keep a job). *Diagnostic and Statistical Manual*
24 of Mental Disorders (DSM-IV), 4th ed., at 30. The Commissioner,
25 however, has explicitly disavowed any use of the GAF scores as an
indicator of disability. In August 2000, the Commissioner, in
discussing comments to the current mental disorder evaluation

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1 regulations (20 C.F.R. §§ 404.1520a, 416.920a), stated that "[t]he
2 GAF scale . . . does not have a direct correlation to the severity
3 requirements in our mental disorder listings." 65 Fed. Reg. 50746-
4 01, 50765 (August 21, 2000). Further, the GAF score is one factor
5 considered in the Commissioner's evaluation. In assessing
6 impairments during social security proceedings, the ALJ must
7 consider the record in its entirety. It is the ALJ's responsibility
8 to determine credibility and resolve conflicts or ambiguities in the
9 evidence presented, and the court will not second guess the ALJ's
10 determination where it is reasonable and supported by substantial
11 evidence. *Morgan*, 169 F.3d at 599; *Andrews*, 53 F.3d at 1039-40.

12 Dr. Kiele's GAF rating was made while Plaintiff was
13 hospitalized (Tr. 140); it is not probative to Plaintiff's ability
14 to do basic work task over a 12 month period. In the case of Dr.
15 Bradley's GAF score, the ALJ did not err in relying on Dr. Bradley's
16 report in its entirety, based on objective testing and a personal
17 interview; that Plaintiff had improved significantly on medication
18 after the July 2001 hospitalization; he was capable of job training,
19 with spelling assistance; and employment problems were not related
20 to a learning disability, memory, or below-average intelligence
21 problems. (Tr. 21, 162.)

22 Having concluded that the medical evidence did not support a
23 finding of "severe impairment," the ALJ considered other relevant
24 evidence, including reports from Patrick Gonzales and Doyle Hardy,
25 mental health counselors at CWCMH. (Tr. 23, 25.) Both therapists
26 are considered "other sources" (i.e., non-medical) by the
27 Regulations for purposes of opinion evidence. 20 C.F.R. §
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1 404.1513(d). Plaintiff argues the mental health counselors
2 assessments should be given "treating physician weight" because they
3 treated him "in conjunction with Dr. Birdlebough, at a team
4 treatment clinic." (Ct. Rec. 23 at 6; Tr. 260.) However, there is
5 nothing in the record to show what extent the counselors were
6 supervised by Dr. Birdlebough, how much contact Dr. Birdlebough had
7 with Plaintiff, and how well and to what extent the counselors
8 informed Dr. Birdlebough of Plaintiff's condition. *See Benton ex*
9 *rel. Benton v. Barnhart*, 331 F. 3d 1030, 1039 (9th Cir. 2003).
10 Therefore, opinions from counselors Hardy and Gonzales properly are
11 considered "other source" opinions. 20 C.F.R. § 404.1513 (d).

12 Non-medical testimony cannot establish a diagnosis or
13 disability absent corroborating competent medical evidence. *Nguyen*
14 *v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). Yet, the ALJ is
15 required to "consider observations by non-medical sources as to how
16 an impairment affects a claimant's ability to work." *Sprague v.*
17 *Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). Pursuant to *Dodrill v.*
18 *Shalala*, 12 F.3d 915, 919 (9th Cir. 1993), an ALJ is obligated to
19 give reasons germane to "other source" testimony before discounting
20 it. It is appropriate to discount lay testimony if it conflicts
21 with medical evidence. *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th
22 Cir. 1984). The ALJ did not reject Mr. Gonzales's testimony
23 entirely; she found his statement regarding Plaintiff's ability to
24 maintain employment was incorrect, a finding that is supported by
25 the record. (Tr. 25, 60-62.) However, Mr. Gonzales's responses to
26 the Daily Activities Questionnaire generally support the ALJ's
27 findings that alleged impairments did not cause more than mild
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1 limitations to Plaintiff's activities of daily living. For example,
2 Mr. Gonzales observed in May 2002, that Plaintiff was attending
3 school daily, could do self care, comply with medication treatment,
4 drive, and understand the television he watched. (Tr. 103-07.) In
5 November 2003, Mr. Gonzales completed Plaintiff's discharge report,
6 noting that Plaintiff appropriately was addressing his activities of
7 daily living. The discharge report also includes an Axis V
8 diagnosis of GAF 38 (current) and 42 (past year), but there is no
9 narrative describing Mr. Gonzales' personal observations of how this
10 affects Plaintiff's ability to work. (Tr. 242.) As discussed
11 above, the Axis V diagnosis by a non-medical sources is not
12 considered. Further, the ALJ is not required to address evidence
13 that is not probative. *Vincent*, 739 F.2d at 1395.

14 The ALJ discounted Mr. Hardy's residual functional capacity
15 assessment for germane and legitimate reasons, *i.e.*, the assessment
16 was completed outside the period at issue and was not supported with
17 more than brief treatment notes that did not indicate Plaintiff's
18 condition would meet the Regulations' durational requirement. (Tr.
19 24.) These reasons are supported by the record. (Tr. 243-44, 257.)
20 Mr. Hardy's clinical notes indicate he began treating Plaintiff in
21 December 2004, outside the closed period at issue. (Tr. 253-60.)
22 It follows that the January 2005 residual functional capacity
23 assessment is for that limited period and therefore not probative.
24 Other than a depressed mood, Mr. Hardy noted no abnormalities in
25 Plaintiff's mental status evaluation. (Tr. 254-55.) Mr. Hardy
26 speculated Plaintiff may have attention deficit disorder, but there
27 is no corresponding medical source diagnosis. (Tr. 256.) The ALJ
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1 did not err in her evaluation of Mr. Hardy's opinions.

2 The ALJ also considered Plaintiff's testimony and noted
3 inconsistencies between his statements and other evidence in the
4 record. (Tr. 25.) As discussed above, an impairment cannot be
5 found "severe" based on a claimant's statement alone. Here, the
6 medical evidence and other relevant information does not establish
7 that Plaintiff's mental impairments caused more than a "slight
8 abnormality" in his ability to do basic work activities. Further,
9 as noted by the ALJ, Plaintiff was able to successfully complete
10 cosmetology school and receive his license during the period at
11 issue; the fact that he was given extra time to complete written
12 tests is not evidence of a "severe" impairment.

13 **D. Vocational Expert Testimony**

14 Plaintiff asserts the vocational expert (VE) testimony
15 demonstrates that his claim is not groundless. Plaintiff represents
16 that the VE "admitted the one remaining job [that the hypothetical
17 individual could perform] was probably beyond [Plaintiff's]
18 capacity." (Ct. Rec. 19 at 20.) However, a review of the VE
19 testimony does not support Plaintiff's contention.

20 Based on her review of the record and hearing testimony, the VE
21 identified Plaintiff's past work as industrial cleaner, mental
22 retardation aide and cashier II.³ (Tr. 303-05, 315.) This testimony

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24 ³ Plaintiff submitted a Work History Report in support of his
25 claim, but did not list specific jobs or description, only that
26 there were 150 past jobs. (Tr. 89.) The Earnings Report lists
27 about eleven employers; some of the work did not amount to
28 substantial gainful activity. Only work within the past 15 years

1 is supported by the Earnings Report submitted. (Tr. 59-62.) At the
2 ALJ's request, the VE did not include Plaintiff's recent training as
3 a cosmetologist or current work as a home aide.

4 In response to the ALJ's hypothetical question, the VE
5 testified the described individual could perform work as an
6 industrial cleaner and, in some settings, cashier. (Tr. 317.) On
7 cross-examination, Plaintiff's counsel asked about reading level
8 requirements for the industrial cleaner and cashier. (Tr. 318.)
9 The VE testified these jobs required a Level 2 reading skill (fourth
10 to sixth grade), well within Plaintiff's tenth grade ability. (Tr.
11 318, 160.) There was no testimony that either job was precluded.
12 (Tr. 318.) Further, at step two, the issue is not whether Plaintiff
13 can perform his past relevant work, but whether his impairment
14 causes more than a "slight abnormality" in his ability to do basic
15 work-related activities. 20 C.F.R. §§ 404.1521, 416.921. The VE
16 testimony does not establish that Plaintiff's mental impairment is
17 "severe."

18 **CONCLUSION**

19 The ALJ's step two finding that Plaintiff's impairments are not
20 "severe" as defined by the Regulations is supported by substantial
21 evidence and free of legal error. Accordingly,

22 **IT IS ORDERED:**

23 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is
24 **DENIED**;

25 _____
26 that was substantial gainful activity and lasts long enough for
27 learning the job is considered as past relevant work. 20 C.F.R.
28 404.1560(b) (1).

2. Defendant's Motion for Summary Judgment (Ct. Rec. 21) is
GRANTED;

3. The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant and the file shall be **CLOSED**.

DATED January 18, 2007.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE